UNITED STATES OF AMERICA	)	
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	)	DEFENSE RESPONSE TO
v.	)	GOVERNMENT'S MOTION TO
	)	PRE-ADMIT EVIDENCE
	)	
SALIM AHMED HAMDAN	)	18 October 2004

1. Timeliness. This response is filed on 18 October 2004 pursuant to a request for an extension from the Defense made via the Assistant to the Presiding office on 15 October 2004.

2. Defense position on Prosecution motion. The Defense opposes the Prosecutions motion to admit en masse more approximately fifty-five 302s in lieu of witness testimony thereby denying Mr. Hamdan his right to confront the witnesses against him, in patent violation of Military Commission Order No.1, and as required by both domestic and international law. Additionally the vast majority of these reports are the product of interrogations conducted utilizing translators of unknown qualification and reliability. Finally, many of these investigative reports are the product of coercive interrogations involving both physical and mental abuse.

The remainder of the evidence constitutes news reports, and other public statements for which the prosecution offers absolutely no theory of relevance or reliability. Prior to there admission the defense seeks a proffer of the fact sought to be asserted and the relevance of and reliability of the evidence by the prosecution.

3. Facts.

a. The Government seeks to introduce approximately 55 reports of investigation (302s) of Mr. Hamdan and other detainees and approximately 70 photographs used in conjunction with the investigations. The 302's in question report the results of interrogations conducted by the U.S. military and law enforcement personnel.

b. These interrogations were conducted by U.S. law enforcement and military personnel utilizing translators both in Guantanamo Bay, Cuba and Kandahar and Bagram, Afghanistan.

c. The government has not disclosed the qualifications, standards for hiring, or reliability of the translators utilized in these investigations

d. Nor has the government provided notes, transcripts or audio/visual recordings of the interrogations utilized in preparing the investigations in question.

e. Detainees, including Mr. Hamdan, were not given the ability to verify or correct the states ascribed to them in the 302s.Nor was the Defense given an opportunity to cross examine either the detainees or the agent making the statement..

f. Defense interviews of detainees indicate that interrogations conducted in Afghanistan were the product of physical and mental abuse, including exposure to extreme cold, physical beating, sensory deprivation, prolonged solitary confinement, threats of death, and/or indefinite imprisonment without trial.

g Interviews of detainees including the accused indicate that statements taken in both Afghanistan and Guantanamo Bay were recorded by audio/visual means and/or that agents took extensive notes during such interviews

h. Detainees indicate that interrogations in Guantanamo Bay stressed that cooperation was paramount to release and that detainees that did not cooperate would be subject to indefinite incarceration without benefit of trial.

i. A recent report on October 17, 2004 found that severe abuse was levied on prisoners at Guantanamo Bay in order to obtain information. See Neil Lewis, Broad Use of Harsh Tactics is Described at Cuba Base, N.T. Times, Oct. 17, 2004, at A1 ("'It fried them,'" the official said, who said that anger over the treatment the prisoners endured was the reason for speaking with a reporter. Another person familiar with the procedure who was contacted by The Times said: "'They were very wobbly. They came back to their cells and were just completely out of it.'"

j. In addition to the reports of investigation, the government seeks to introduce transcripts of interviews and proclamations and other news releases related to Al Qaeda and other public figures.

4. Military Commission Law Requires that the Commission Reject the Government's Attempt to Circumvent Mr. Hamdan's Right to Cross-Examine the Witnesses Against Him.

The prosecution seeks to circumvent Mr. Hamdan's right to cross examine the witness against him by admitting the bulk if not all of testimony against him under the guise of reports of investigation (302s) by claiming that these reports are probative to a reasonable person. The Probative evidentiary standard,however, does not eclipse Mr. Hamdan's right to confron the evidence against him particularly when the substitute for testimony are as riddled with errors as the reports sought to be introduced by the Prosecution.

From the days of our birth as a nation, the United States has considered the right of the accused to confront the witnesses against him paramount to a fair trial. As the Supreme Court recently noted, in *Crawford v. Washington*, 24 SCT 1354 (2004), "dispensing from confrontation because testimony is obviously reliable is akin to dispensing to a jury trial, because a defendant is obviously guilty."*Id.* at 1371. *Crawford*'s origins are reflected in the Sixth Amendment to the United States Constitution, but the actual genesis of the rule comes from as far back as Roman times. See *Coy* v. *Iowa*, 487 U.S. 1012, 1015, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988); Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994). The Founders of our Republic were motivated by English common law, which stresses the importance of live testimony in court subject to adversarial testing. See 3 W. Blackstone, Commentaries on the Laws of England 373-374 (1768).

The founders, as *Crawford* explains, considered the right of an accused to confront the witnesses against him essential to a fair process. Specifically, the Court cites to the:

> Many declarations of rights adopted around the time of the Revolution guaranteed a rightof confrontation. See Virginia Declaration of Rights § 8 (1776); Pennsylvania Declaration of Rights § IX (1776); Delaware Declaration of Rights § 14 (1776); Maryland Declaration of Rights § XIX (1776); North Carolina Declaration of Rights § VII (1776); Vermont Declaration of Rights Ch. I, § X (1777); Massachusetts Declaration of Rights § XII (1780); New Hampshire Bill of Rights § XV (1783), all reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 235, 265, 278, 282, 287, 323, 342, 377 (1971). The proposed Federal Constitution, however, did not. At the Massachusetts ratifying convention, Abraham Holmes objected to this omission precisely on the ground that it would lead to abhorrent practices: "The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, . . . the *Inquisition.*" 2 Debates on the Federal Constitution 110-111 (J. Elliot 2d ed. 1863). Similarly, a prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Schwartz, *supra*, at 469, 473 *Id. at 1362*

The prosecution is attempting to circumvent Mr. Hamdan's time-honored right to confront the evidence. This is not a circumstance where the individuals who made the statements are at large and unavailable to testify. Rather, the Prosecution is attempting to admit evidence by the very same individuals that are currently within their control. There is simply no excuse for not producing these witnesses in this case. The evidence sought to be introduced by the prosecution is not even close to the best evidence.

As Justice Scalia observed for the Court in *Crawford*, "(v)ague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's--great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear." *Id.* at 1373. In precisely the circumstances warned against by Justice Scalia the prosecution validates his concerns. Introduction of the witness statements contained in the 302's in lieu of testimony renders meaningless Mr. Hamdan's right to cross examine the witnesses against him, mocking the President's mandate that the commissions be "full and fair," and giving life to Abraham Holmes's warning of justice that is a little less inauspicious than a certain tribunal in Spain.

Nor can the prosecution take refuge in the fact that the probative standard has been recently utilized in international tribunals for war crimes. Col Fred Borch (then Chief Prosecutor for the Military Commissions) in his article, *Why Military Commissions are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice*, points to the rules of the International Criminal Tribunal for the former Yugoslavia permitting the admission of evidence, if it is deemed to have probative value as proof that the probative standard allowing hearsay evidence is fundamentally fair." According to Col. Borch, it "stands to reason that there is nothing fundamentally unfair about admitting hearsay at a criminal proceeding even though such evidence is generally exclude at Courts Martial…" 2003 Army Law 10,13 (November 2003).

Since the Former Chief Prosecutor has cited the Yugoslavian Tribunals as the foundation that its standard does not violate the requirement that the Commissions be "full and fail," it stands to reason that the Yugoslavian Tribunals' rules should inform the Presiding Officer and the Commission. In Kordic and Cerkez (IT-95- 14/2), the Tribunal rejected the prosecution efforts to admit seven witness statement collected by the prosecutors holding that while it could admit the witness statements under the provision of the rules that such "would amount to a wholesale admission of hearsay testimony untested by cross examination, namely the attack on Tulica (the crime in question) **and would be of no probative value. (**Emphasis added)"

In haste to preclude Mr. Hamdan's right to confront the witnesses against, the Prosecution rejects that they are required to demonstrate even a scintilla of reliability of the statements they seek to introduce. In so doing the Prosecution necessarily implies that a reasonable person is unconcerned with the circumstance under which a statement was obtained in determining its probative value. and attempts to evade its burden, as the proponent of the evidence, to demonstrate the reliability of its evidence. A standard probative to a reasonable person may make the government's burden easier, but it does not relieve the government of a showing that evidence sought to be introduced is relevant and reliable. No showing of relevance has been made; instead the prosecution has provided a document dump, pure and simple.

Indeed in this case, there is substantial reason to believe that the government may not be able to meet this reduced threshold burden. In the interrogations of Mr. Hamdan and other detainees, on which the 302's are based a translator was normally required. During many of the interrogations, the interrogator would ask verbal questions to the detainee in English. A translator would then translate the questions from English to the detainee's language (Arabic, Pashtun, etc.) and then translate the detainee's answer to English. The 302's indicate that the reports were subsequently dictated following the interrogations. The 302's do not indicate whether the agent preparing the 302 relied on his/her memory, individual notes, and the notes of others, audio/visual recordings or other medium in preparing the 302. Under these circumstances it is impossible to determine the reliability of any particular statement by the accused or any other detainee regarding the accused conduct. As was recently observed during Commissions proceedings, even under the best circumstance, translation error remains a strong possibility. Without the ability to determine whether the 302 accurately transcribe statements made by the accused or other detainees they cannot be said to be probative to a reasonable person.

The Prosecution, to this day, has not provided the names and contact information of the translators to the defense. It has, to this day, not provided the circumstances under which each 302 was made, including the time, location, and coercive techniques used, if any, to elicit information. It has not stated who all of the witnesses present at these interrogations were. It has refused to turn over the impressions, notes, and recordings of these interviews taken by other people who were present at them. Under these circumstances, there is simply no way to assess the reliability of the information the Prosecution seeks to introduce. It has made literally no showing at all.

Finally the coercive tactics employed by the investigators in obtaining Mr. Hamdan's statements clearly undermine their reliability. Several of the witnesses, including Mr. Hamdan, describe beatings and other negative conditions they had to endure during their days/weeks/months in Bagram. After being transported to Kandahar, witnesses spent several months awaiting decisions regarding their captivity, all the while being interrogated. Coercive tactics were used to gain information from witnesses while held in captivity in Afghanistan. These tactics included being hidden from visiting members of the International Red Cross, solitary confinement, exposure to extreme cold, physical beatings before, during, and after interrogations, and using dogs and other means of threatening life. Several witnesses have disclosed that they agreed with the interrogator when they could tell that that was the information being sought. These circumstances most definitely affected the reliability of the original statements. A recent front-page report yesterday in the New York Times, mentioned and cited above, confirms such abuse, quoting individuals who were present at these abuse sessions.

The remainder of the evidence sought to be introduced by the prosecution is offered without any demonstration of probative value to the charge in this case. The Prosecution seeks introduce a wide variety of news reports, alleged proclamations, trial transcripts and other documents against Mr. Hamdan without any proffer of there relevancy The Prosecution does not explain in its motion what piece of evidence is beneficial to their case to prove up any element of the charge. There is no factual discussion in its motion where the prosecution explains why the evidence is probative to a fact-finder. The Prosecution must be held to some basis of relevance, for if not, the proverbial kitchen sink can be used to demonstrate that Mr. Hamdan conspired to commit the crimes alleged.

The Defense would be pleased to join in the admission of particular documents and facts for the Commission's consideration once the Prosecution has provided a full and fair explanation of each item, including its provenance and purported reliability. However, until the Government demonstrates some evidentiary value and basis to the particular item, we will not address it. The Defense will therefore address each piece of evidence on the record in front of the Military Commission and state our objection at that time. But it would be manifestly unfair to permit the wholesale introduction of hundreds of pages of testimony without the traditional showing of reliability and facts given to the defense about each particular document *in advance* to test that claim. .

5. Legal Authority Cited.

a. *Crawford v. Washington*, 24 SCT 1354 (2004

b. *Coy* v. *Iowa*, 487 U.S. 1012, 1015, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988)

c. Herrmann & Speer, Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause, 34 Va. J. Int'l L. 481 (1994).

d. *Why Military Commissions are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice*, Col Fred Borch, JAG Corps, U.S. Army, 2003 Army Law 10,13 (November 2003).

e. Kordic and Cerkez (IT-95- 14/2

6. Resolution. Motion should be resolved with a hearing on the record and in conformity with the procedures set out in Military Commission Order No. 1. 7. Attachments. None.

7. Argument. The Defense believes oral argument is required to discuss the application of the rules of evidence.8. Witnesses/Evidentiary Matters. Each piece of evidence the Government seeks to introduce requires discussion during the hearing and the defense request any and all witnesses necessary to relevant to the probative value of that piece of evidence. Additional Information. Defense Counsel went to Guantanamo during the week of 10-15 October 2004 to interview various detainees. The notes taken by undersigned Defense Counsel, including even the notes of the interviews of his *own client*, were first time deemed potentially classified by the Joint Task force and as such could not be transported by Defense Counsel. Consequently Defense Counsel was obligated to send his note and that of his teams through the U.S. mail to the Federal Court security Officer for the D.C. habeas cases to ensure that he did not violate Court order or applicable security requirements. As such, the Defense does not anticipate access to these notes for 10-14 days and is so precluded from specific witness requests concerning the reliability of the 302s at this time.

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